

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaints)
Against John Vincent)

**SUMMARY OF FACTS AND
STATEMENT OF FINDINGS**

Roger Koopman filed two complaints against John Vincent, alleging that certain campaign materials created and distributed by Vincent violated campaign finance and practices laws. This decision addresses both complaints.

SUMMARY OF FACTS

1. Roger Koopman and John Vincent were opposing candidates for House District 70 (HD 70) in the 2006 general election. Koopman was the incumbent, running for reelection. Koopman ran as a Republican, and Vincent as a Democrat.

2. Koopman complains about five of Vincent's campaign advertisements that were published in the Bozeman Daily Chronicle prior to the election. In addition, several of the campaign messages were prepared as campaign flyers and distributed to households throughout HD 70. The complaint alleges violations of §§ 13-35-225, 13-35-301, and 13-37-131, MCA.

Campaign Ad No. 1

3. On September 25, 2006, the following campaign ad was published in the Bozeman Daily Chronicle:



4. Koopman complains about the following statements in the ad:
- “Roger Koopman has the Legislature’s worst voting record on fighting meth!”
 - “Roger voted against every Anti-Meth Bill passed by the Legislature and signed into law.”

Koopman alleges the ad violates the following statutes:

- Vincent failed to reference the particular votes upon which the two statements are based, in violation of § 13-35-225(3)(a)(i), MCA.
- The ad fails to identify Vincent's party affiliation, in violation of § 13-35-225(2), MCA.
- The ad does not include a statement of accuracy, in violation of § 13-35-225(3)(a)(iii), MCA.
- The ad does not disclose contrasting votes made by Koopman regarding the same issue, a violation of § 13-35-225(3)(a)(iii), MCA.
- The ad falsely asserts that Koopman voted against every anti-meth bill, when legislative records establish that Koopman voted in favor of House Bill (HB) 60 and HB 340. Koopman alleges this constitutes a violation of § 13-37-131, MCA.

5. A footnote in the ad below the statements regarding Koopman's voting record on meth references: "Official Montana Legislature Services Voting Record." No specific bill numbers or votes are referenced.

6. The ad does not include Vincent's party affiliation or the party symbol. Vincent acknowledged the ad was deficient in this respect, but stated the error was corrected before Koopman filed the complaint.

7. The ad does not contain a "statement of accuracy" as required by § 13-35-225, MCA. Vincent contends he has not seen any campaign ads for other candidates that contain such a statement.

8. Koopman contends there were at least two "contrasting" votes that should have been listed in the ad. According to Koopman, he voted yes on HB 60 and HB 340.

9. HB 60 in the 2005 session of the Montana Legislature was a bill for an act establishing a decontamination standard for the cleanup of indoor property contaminated as a result of the clandestine manufacture of meth. Koopman voted no on the bill on second and third reading after it was introduced in the House.

After HB 60 was returned to the House with Senate amendments, Koopman voted yes on the question of suspending the rules to accept the late return of an amended bill. Koopman then voted yes on second reading, on the limited question of whether to accept the Senate amendments. These votes were not, however, yes votes on final passage of the bill itself.

Koopman was excused and therefore did not vote on HB 60 on third reading when it was passed with the Senate amendments. Koopman stated he was out of state at the time and was unable to arrange a proxy vote when the bill was up for third reading.

10. HB 340 in the 2005 session of the Montana Legislature was a bill for an act providing for television and radio announcements describing the physical, mental, and emotional effects of meth on a person. Koopman voted yes on second reading. The bill was then again referred to committee, where it was tabled.

Campaign Ad No. 2

11. On September 26, 2006 the following campaign ad was published in the Bozeman Daily Chronicle:

**WHY DOESN'T
ROGER SUPPORT
PUBLIC EDUCATION?**

YOU SHOULD KNOW ROGER KOOPMAN...

- ✓ Has a 6% voting record in support of public education, kids and teachers, the 2nd lowest of all 150 Montana Legislators.¹
- ✓ Voted against improving school bus safety for kids on dangerous roads like US 191.²
- ✓ Has testified in support of ending required school attendance and attempted to eliminate "free and reduced" school lunches for needy kids.³
- ✓ Stated that "public schools" are "not an option" for parents "who see a lifestyle of drugs, alcohol and premarital sex as unacceptable for their kids."⁴

¹ Montana Education Association 2005 Legislative Voting Record
² Montana Legislative Services Publication, 2005 Session Second and Third Reading Votes
³ Montana House Judiciary Committee, January, 1999
Montana House Education Committee Report, December, 2005
⁴ Bozeman Daily Chronicle, March 6, 1997

**ROGER KOOPMAN
AT THE BACK OF THE
CLASS ON EDUCATION!**

Printed by Vincent for the House, Peggy Vincent, Triskette, 680 Low Birch Road, Optima (Glenview), MS 09730

Bozeman Chronicle 9-26-06

12. Koopman contends the four checked statements in the ad exhibit the same statutory violations described in Fact 4 (failure to reference particular votes, failure to include a statement of accuracy, failure to disclose contrasting votes, failure to identify Vincent's party affiliation, and false statements).

13. The first three checked statements in Vincent's ad contain, respectively, the following three footnote references:

- Montana Education Association 2005 Legislative Voting Record
- Montana Legislative Services Publication, 2005 Session Second and Third Reading Votes
- Montana House Judiciary Committee, January, 1999; Montana House Education Committee Tape, December, 2005

The ad does not contain any references to specific bill numbers or specific votes. In response to the complaint Vincent contended that reference to all the specific bills would have necessitated listing 18 bill numbers.

14. The ad does not contain a "statement of accuracy" as required by § 13-35-225, MCA.

15. Koopman maintains the ad should have disclosed contrasting votes he made on the issue of public education reform. He contends that his sponsorship of the following bills during the 2005 session of the Montana Legislature demonstrates his support of public education reform: HB 404, HB 456, HB 495, and HB 629.

16. In response Vincent contends that because the bills cited by Koopman were not supported by the Montana Education Association (MEA), Vincent did not consider them comparable to the ones that MEA supported.

17. While the four bills referenced by Koopman all deal with some aspect of public education, none of the four made it past second reading.

HB 404, according to its short title, would have restricted subjects of school district collective bargaining regarding volunteers. The bill received a hearing before the House Education Committee but was never voted on by the committee. A motion to take the bill from the committee and take it to second reading failed, and the bill missed the transmittal deadline for revenue bills.

HB 456 authorized creation of charter schools and charter school districts exempt from many of the provisions of Title 20, MCA. The bill deadlocked on a vote of the House Education Committee following a hearing. It was then taken from the committee and placed on second reading, where it was not passed.

HB 495 included public or private nonprofit schools as qualified endowments for purposes of tax credits. The bill received a hearing before the House Education Committee but was tabled several days after the hearing.

HB 629 would have authorized teacher certification for persons who do not hold a teacher certificate issued by the Superintendent of Public Instruction. The bill received a hearing before the House Education Committee but was never voted on and missed the deadline for general bill transmittal.

18. The ad does not include Vincent's party affiliation or the party symbol.

19. Koopman claims the ad "deceptively quotes a sentence fragment from a 3/6/92 opinion column out of context, to falsely assert that Koopman is against public schools," alleging that this constitutes a violation of § 13-37-131(1), MCA. The sentence at issue in the ad represents that Koopman "stated that 'public schools' are 'not an option' for parents 'who see a lifestyle of drugs, alcohol and premarital sex as unacceptable for their kids.'"

20. The opinion piece written by Koopman was published in the Bozeman Daily Chronicle on March 6, 1992. The opinion, entitled "Education Demands Moral Foundations," was critical of drug education and sex education courses in the public schools. The concluding paragraph of the piece states:

For an increasing number of parents, the choices are crystal clear. If you want to keep your kids sexually pure, off of drugs and out of jail, you can send them to an excellent private school like Heritage Christian, or you can educate them at home. For most parents who see a lifestyle of drugs, alcohol and premarital sex as simply "not an option" for their children, they see public schools as not an option, either.

Campaign Ad No. 3

21. On September 27, 2006 the following campaign ad was published in the Bozeman Daily Chronicle:

DOES ROGER PRACTICE WHAT HE PREACHES?

BEFORE HE WAS ELECTED, ROGER KOOPMAN SAID:

- ✓ "... name calling is the final refuge of people who have no ideas and have no arguments. It contributes nothing and diminishes us all."^{*}

AFTER HE WAS ELECTED, ROGER KOOPMAN SAID:

- ✓ Legislators voting differently than Roger are, "LEGISLATIVE LEMMINGS"¹
- ✓ John Vincent "IS A PUBLIC DISGRACE"²
- ✓ Legislators have become "LICE ON THE BODY POLITIC"³

^{*} Bozeman Daily Chronicle, 2/7/03, 1 Bozeman Daily Chronicle, 2/13/06
² Bozeman Daily Chronicle, 10/10/05, 3 Great Falls Tribune, 4/20/05

**ROGER KOOPMAN
RISING BELOW
HIS PRINCIPLES!**

Paid for by Vincent for the House, Peggy Vincent, Treasurer, 680 Low Bench Road, Gallatin Gateway, MT 59730

Bozeman Chronicle 9-27-06

22. Koopman complains about the following statements in the ad, which are partial quotations that Koopman contends are taken out of context:

- Legislators voting differently than Roger are, "legislative lemmings."

- John Vincent “is a public disgrace.”
- Legislators have become “lice on the body politic.”

Koopman contends the quoted statements amount to false assertions in violation of § 13-37-131(1), MCA.

23. The “legislative lemmings” quote was taken from an opinion piece written by Koopman and published in the Bozeman Daily Chronicle on February 13, 2006, wherein Koopman wrote:

I wasn’t sent to the legislature to put my brain in mothballs and my conscience on ice. Especially when I hear the word “tax” (or “regulation”), my antenna go up mighty fast. And if I determine, in my own good conscience, that a bill is wrong, I will vote accordingly – regardless of how many legislative lemmings are galloping over the cliff.

24. The “public disgrace” quote was taken from a Bozeman Daily Chronicle article published on October 18, 2006. The article reported that Vincent had demanded a public apology for comments Koopman made about Vincent in a newspaper opinion piece. Koopman was quoted in the article as follows:

But Koopman said Monday that no apology is coming. Instead, he called on Vincent to resign from the commission.

“John Vincent is out of control,” he said. “He may have been a respectable figure once, but now he is a public disgrace.”

25. The “lice on the body politic” quote was taken from an article published in the Great Falls Tribune on April 20, 2005. The article reported on a disagreement between House Democrats and Republicans in the 2005 regular session of the Montana Legislature, regarding the amount of funding to be included in HB 2, the main budget bill for the next biennium. Koopman was quoted in the article as follows:

Rep. Roger Koopman, R-Bozeman, put it more bluntly, saying big government spending in HB 2 would take the steam out of Montana’s economy, which has been doing relatively well.

“We’ve become like lice on the body politic, slowly draining the life out of Montana’s economy,” he said.

26. Koopman does not dispute that he made the statements quoted in the ad, but contends the statements were quoted out of context by Vincent, thereby obscuring their true meaning. Koopman said he would never refer to legislators as “legislative lemmings.” He stated his comments were in reference to HB 22, a 2005 bill that involved funding for water adjudication. Koopman was one of two House members to vote against the bill, but he contends his comment was not a statement that legislators who vote differently than him are lemmings.

Koopman admits he referred to Vincent as a “public disgrace.” He stated that Vincent, while serving as a county commissioner, questioned the honesty of a property developer. Koopman believed Vincent’s actions were disgraceful, so he pointed that out. Regarding the “lice on the body politic” statement, Koopman contends he was referring to the spending habits of the Legislature and how that can have a negative effect on the economy.

27. Vincent believes the ad contains accurate quotes and that it was appropriate to include the quotes in his ad.

Campaign Ad No. 4

28. The following two-page campaign flyer was distributed to voters in HD 70 between November 2 and November 5, 2006. Page 2 of the flyer, “A Message to Republican Voters from a Republican Voting for John Vincent,” was also published in the Bozeman Daily Chronicle on November 4, 2006.

9 FINE REASONS TO VOTE FOR JOHN VINCENT

1. JOHN VINCENT is the ONLY candidate for HD 70 Representative that LIVES IN HD 70 (Gallatin Gateway). ROGER KOOPMAN lives in HD 66 in downtown Bozeman.
2. JOHN VINCENT is Tough on METH. Roger Koopman compiled the Legislature's Lowest and Worst voting record on this dangerous drug.
3. JOHN VINCENT is supported by the top law enforcement officer in the state, Attorney General Mike McGrath, as well as local police, Fire Fighters, EMTs and state transportation officials - people who depend on smart and effective legislative leadership to succeed in protecting the public.
4. JOHN VINCENT was a classroom teacher for 30 years. COMMITTED TO QUALITY PUBLIC EDUCATION, Roger Koopman had the 2nd lowest legislative voting record on education, teachers and kids in the 2005 Legislature (6%).
5. JOHN VINCENT is a strong supporter of PUBLIC ACCESS TO PUBLIC LANDS AND STREAMS. Co-sponsor of Montana's landmark Stream Access Law. Roger Koopman voted 3 times to kill "public access to public streams" legislation in the 2005 Legislature.
6. TOUGH ON CRIME. Roger Koopman voted AGAINST requiring CONVICTED FELONS (including felons convicted of violent sexual assaults) to provide a DNA sample to help solve "cold case file" crimes.
7. JOHN VINCENT is a MODERATE AND BIPARTISAN candidate and has been endorsed both by Democratic Governor Brian Schweitzer AND Republican LT. Governor John Bohlinger.
8. JOHN VINCENT is effective and experienced. In 1981 John, was selected as one of the most effective legislators in the House (10th). Quite an accomplishment when a majority of the votes cast were by Republicans! In the 2005 Legislature, Roger Koopman failed to pass any of the bills he had drafted and introduced out of the House (zero for 14).
9. JOHN VINCENT has an Eight Point US 191 Safety Plan ready to be introduced in the 2007 Legislature. Roger Koopman failed to lead the legislature to provide adequate funding for 191 safety.

A MESSAGE TO REPUBLICAN VOTERS FROM A REPUBLICAN VOTING FOR JOHN VINCENT

Perry voted right on meth legislation; Koopman didn't

I'm a Republican, veteran, retired law enforcement officer and former contract officer with the U.S. Marshall Service, and I will be voting for Democrat John Vincent for House District 70 representative this November. John has been a strong leader in the fight against meth. His Republican opponent, Roger Koopman, has not. Mr. Koopman voted "no" on all six bills to fight meth passed by the 2005 Legislature and signed into law by Gov. Schweitzer. My Republican state senator in House District 70, Gary Perry, voted "yes" on all six bills.

On top of that, Mr. Koopman voted "no" on legislation to require convicted felons, including sexual predators, rapists and other violent offenders, to provide a DNA sample to help solve crimes. This was HB 113, the Cold Case File bill. Once again, my Republican senator, Gary Perry, voted "yes" on this important crime-fighting legislation. HB 113 passed the House and Senate with more than 40 Republican representatives and senators voting for it. HB 113 is now state law.

Sen. Perry is my kind of Republican. Roger Koopman is not. I'll be voting for a lot of Republicans this November, but Mr. Koopman won't be one of them.

Donna G. Farrah
Gallatin Gateway

The only candidate running for District 70 Representative that lives in District 70.

JOHN VINCENT
LEADERSHIP WE CAN TRUST
STATE REPRESENTATIVE • DISTRICT 70

Revised by request to the House, Roger Koopman, Republican, did not vote on HB 113, the Cold Case File bill, in the 2005 Legislature.

29. Koopman alleges the following statement in Reason 8 on the first page of the flyer falsifies his legislative record: “In the 2005 Legislature Roger Koopman failed to pass any of the bills he had drafted and introduced out of the House (zero for 14).” Koopman contends he introduced 18 bills in the 2005 Legislature, three of which passed out of the House: HB 366, HB 528, and HB 759. Koopman claims the statement in Reason 8 is false, in violation of § 13-37-131, MCA.

30. Koopman is listed as the primary sponsor of HB 366, HB 528, and HB 759 in the 2005 Montana Legislature. All three bills passed out of the House, and HB 528 and HB 759 were eventually signed into law.

31. Vincent stated he did his own research for his campaign ads. When composing the representations in campaign ad 4 Vincent initially reviewed the House Journals, and then later researched bills on the Montana Legislature website. Vincent stated any other bills that may have passed out of the House were actually drafted by other legislators. Specifically, Vincent contends HB 366 was requested by and drafted for Rep. Curtiss, HB 528 was requested by and drafted for Rep. Furey, and HB 759 was requested by and drafted for Sen. Story.

32. Koopman provided letters and statements from representatives of the Montana Legislative Services Division and Sen. Story in support of his contention that he was involved in drafting and sponsoring HB 366, HB 528, and HB 759.

33. Koopman alleges that Reasons 2, 4, 5, and 6 of the campaign flyer include “broad, negative assertions” regarding Koopman’s voting record, but do not include references to specific bill numbers and votes as a basis for the assertions, in violation of § 13-35-225(3)(a)(i), MCA. Koopman also contends that no contrasting votes are included, in violation of § 13-35-225(3)(a)(ii), MCA. Koopman claims “there are many” contrasting votes, but his complaint does not refer to any. Koopman also alleges the flyer does not include a signed statement of accuracy, in violation of § 13-35-225(3)(a)(iii), MCA.

34. Campaign ad 4 does not include references to specific bill numbers or votes, and does not include a statement of accuracy as required by § 13-35-225, MCA.

35. Vincent states he didn’t include references to specific bill numbers or votes, and he did not include a statement of accuracy in the ad, because he didn’t realize he was required to do so. Vincent contends that to the best of his knowledge Koopman did not cast any “contrasting votes.” He notes that Koopman did not reference in his complaint any such contrasting votes that he may have cast, other than to claim “there were many.” Vincent reiterated that he did his own research for his campaign ads, and any mistakes he may have made were an oversight.

Campaign Ad No. 5

36. A Vincent campaign flyer was distributed to voters in HD 70 prior to the November, 2006 election. The center page of the flyer, "A Positive Platform – Bipartisan Support," (reproduced below) was also published in the Bozeman Daily Chronicle on November 3, 2006.

- A POSITIVE PLATFORM - BIPARTISAN SUPPORT -

METH	CONSERVATION/ ENVIRONMENT
<p>JOHN is recognized as a leader in the fight against METH. Chairman, METH Sub-Committee, Gallatin County Criminal Justice Coordinating Council and active in Montana Meth Project. John supports continued legislative efforts to fight METH.</p> <p>ROGER has the Legislature's lowest voting record on Meth (150% of 190 legislators). Voted "no" on all 5 bills passed by the legislature to fight METH. HD 70's Republican State Senator voted "yes" on all 6 bills.*</p> <p><small>*199 S.B. 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.</small></p>	<p>JOHN, as a Gallatin County Commissioner, helped stop two bad methane development on Bozeman Pass and establish 300 foot development set-backs on streams. As a legislator, sponsored stream preservation and public interest citing criteria for subdivisions. Favors increased protection for wildlife habitat, sensitive riparian areas, innovative measures to prevent sprawl and protect clean air and water.</p>
<p>JOHN was a co-sponsor of Montana's landmark stream access law and will support stream access legislation defeated in the 2005 legislative session.</p>	<p>ROGER voted twice against HB 550 to assure public access to streams at county bridges. He also voted against allowing the House of Representatives to debate the bill.*</p> <p><small>*Montana Legislative Services website.</small></p>
<p>STREAM ACCESS</p>	<p>EDUCATION</p>
	<p>JOHN is committed to public education. A High School classroom teacher for 30 years, John has been recognized by his students as a "most inspirational" & "most influential" teacher.</p>
	<p>ROGER has the Legislature's 2nd lowest voting record on public education, 86%.* Has testified in favor of ending required school attendance.* Introduced amendment to eliminate free and reduced school lunches for needy kids during the 2005 Special Legislative Session.*</p> <p><small>* Montana Education Association, "Noting Record," 2005. * Montana Public Education Association, 2005. * Montana House Education Committee, 2005.</small></p>

The only candidate
Representative

JOHN VINCENT
★ LEADERSHIP
STATE REPRESENTATIVE

37. Koopman complains about the following statements in the ad:

- “Roger has a 5.2% conservation/environmental voting record.”
- “Roger has the Legislature’s 2nd lowest voting record on public education (6%).”
- “[Roger] has testified in favor of ending required school attendance.”
- “[Roger] introduced amendment to eliminate free and reduced school lunches for needy kids during the 2005 Special Legislative Session.”

Koopman alleges the ad fails to reference the particular bill numbers and votes upon which the statements are based, in violation of § 13-35-225(3)(a)(i), MCA. Koopman also claims the ad does not include a signed statement of accuracy, in violation of § 13-35-225(3)(a)(iii), MCA.

38. Koopman complains about the ad’s reference to HB 60 in the list of “no” votes following the statement regarding Koopman’s voting record on meth. Koopman claims that he voted “yes” on HB 60. The history of that bill and Koopman’s voting record are described in Facts 4, 8, and 9.

39. In support of the statement regarding Koopman’s voting record on meth, the ad cites a number of House bills and Senate Bills, but does not include a reference to specific votes cast by Koopman on those bills. In support of the statement that Koopman has the Legislature’s second lowest voting record on public education, the ad cites “Montana Education Association Voting Record, 2005.” In support of the statement that Koopman testified in favor of ending required school attendance, the ad cites “Montana Judiciary Committee, 1999.” In support of the statement that Koopman introduced an amendment to eliminate free and reduced school lunches, the ad cites “Montana House Education Committee tape, 2005.”

40. The ad does not contain a “statement of accuracy” as required by § 13-35-225, MCA.

41. Koopman’s complaint also alleges that campaign ads 1, 2, and 3 violate § 13-35-301, MCA, Montana’s “Code of Fair Campaign Practices.”

42. According to records provided by Vincent, the total cost of the five ads was \$6,624.92.

43. Koopman attached a copy of one of his own campaign flyers to the second complaint he filed against Vincent. The flyer contains representations regarding Vincent’s voting record when he was a legislator, listing various bill numbers and indicating that Vincent voted “yes” or “no” on particular bills. Koopman included with the flyer a copy of a memorandum from Koopman to the Commissioner stating that the statements made in the flyer about Vincent’s voting record “are accurate and true, to the best of my knowledge.” The memorandum was not received in the Commissioner’s office prior to receipt of the complaint. The flyer does not include a statement of accuracy and does not list any contrasting votes.

44. Vincent included with his written response to the complaint a copy of another one of Koopman’s campaign flyers containing representations regarding Vincent’s voting record on legislation providing tax increases and legislation affecting gun owners and sportsmen. The flyer does not reference specific bill numbers or votes, does not include a reference to possible contrasting votes, and does not include a statement of accuracy. Vincent states he provided the Koopman flyer not to excuse his own possible failure to meet the requirements of Montana’s election laws, but to point out that if he fell short, so did Koopman. Neither Vincent nor anyone else filed a complaint regarding Koopman’s campaign materials.

STATEMENT OF FINDINGS

Alleged Violations of § 13-35-225, MCA

§ 13-35-225, MCA provides:

Election materials not to be anonymous -- statement of accuracy. (1) All communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising must clearly and conspicuously include the attribution "paid for by" followed by the name and address of the person who made or financed the expenditure for the communication. When a candidate or a candidate's campaign finances the expenditure, the attribution must be the name and the address of the candidate or the candidate's campaign. In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer.

(2) Communications in a partisan election financed by a candidate or a political committee organized on the candidate's behalf must state the candidate's party affiliation or include the party symbol.

(3) (a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include:

- (i) a reference to the particular vote or votes upon which the information is based;
- (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if closely related in time; and
- (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

(b) The statement required under subsection (3)(a) must be signed:

- (i) by the candidate if the election material was prepared for the candidate or the candidate's political committee and includes information about another candidate's voting record; or
- (ii) by the person financing the communication or the person's legal agent if the election material was not prepared for a candidate or a candidate's political committee.

(4) If a document or other article of advertising is too small for the requirements of subsections (1) through (3) to be conveniently included, the candidate responsible for the material or the person financing the communication shall file a copy of the article with the commissioner of political practices, together with the required information or statement, at the time of its public distribution.

(5) If information required in subsections (1) through (3) is omitted or not printed, upon discovery of or notification about the omission, the candidate responsible for the material or the person financing the communication shall:

- (a) file notification of the omission with the commissioner of political practices within 5 days of the discovery or notification;
- (b) bring the material into compliance with subsections (1) through (3); and
- (c) withdraw any noncompliant communication from circulation as soon as reasonably possible.

The campaign ads and materials created by Vincent qualify as communications subject to the requirements of the statute.

Campaign ads 1 and 2 fail to comply with § 13-35-225(2), MCA, because they do not state Vincent's party affiliation or include the party symbol.

Campaign ads 1, 2, 4, and 5 fail to comply with § 13-35-225(3)(a)(i), MCA. Each of those ads include information about another candidate's voting record. None of the ads reference the particular vote or votes upon which the information represented in the materials are based.

Campaign ads 1, 2, 4, and 5 also violate §§ 13-35-225(3)(a)(iii) and 13-35-225(3)(b)(i), MCA. The ads do not include a statement, signed by the candidate, stating that to the best of the candidate's knowledge the statements concerning the opposing candidate's voting record are accurate and true.

The complaint alleges campaign ads 1, 2, and 4 violate § 13-35-225(3)(b)(ii), MCA because they fail to disclose "contrasting votes known to have been made by the candidate on the same issue if closely related in time."

Concerning campaign ad 1, Koopman contends he voted yes on HB 60 and HB 340, and that those votes should have been disclosed as contrasting votes on the issue of meth. Koopman contends that his votes on four bills – HB 404, HB 456, HB 495, and HB 629 – should have been included in campaign ad 2, regarding the issue of public education.

The votes by Koopman described above do not appear to constitute "contrasting votes . . . on the same issue." As noted, ads 1 and 2 do not reference the particular votes upon which the representations in the ads are based, nor do they reference any specific bill numbers. See Facts 5 and 13. As a result, they fail to comply with § 13-35-225(3)(a)(i), MCA. However, it is not possible to conclude that Koopman's votes on the six bills he cites should have been disclosed as

“contrasting votes known to have been made by the candidate on the same issue” since there is no particular vote to contrast with.

Regarding campaign ad 4, while Koopman alleges “there are many” contrasting votes that Vincent’s campaign ad should have disclosed, he has not identified any such votes so it is not possible to evaluate his contention.

Alleged Violations of § 13-37-131, MCA

The complaint alleges Vincent’s campaign materials contain false statements or misrepresentations in violation of § 13-37-131(1), MCA. That statute prohibits a person from misrepresenting “a candidate’s public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.” As discussed below, when construing statutes similar to § 13-37-131, MCA, the courts have consistently afforded a high degree of First Amendment protection to campaign statements made by candidates for public office.

The mental state requirement in the statute is derived from the landmark case of New York Times v. Sullivan, 376 U.S. 254 (1964). In that case the United States Supreme Court held that a public official could not recover on a claim for defamation brought against a newspaper unless he proved “actual malice,” which the Court defined as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” Id., 376 U.S. at 279-80. The Court based its decision on the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” Id., 376 U.S. at 270. The high degree of First Amendment protection afforded by the New York Times rule is underscored by the requirement that actual malice must be proven with “convincing clarity.” Id., 376 U.S. at 285-86.¹

As a sitting legislator running for reelection, Koopman was a “public official”

¹ In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court noted that the New York Times rule calls for “clear and convincing proof that the defamatory falsehood was

at the time of the alleged false statements or misrepresentations made by Vincent. The Supreme Court has also held that the New York Times standard applies to candidates for public office. In several later opinions the Court applied the standard in libel actions brought by two candidates against newspapers that had printed allegedly defamatory statements about them. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). In Monitor Patriot Co. the Supreme Court stated:

[P]ublications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That New York Times itself was intended to apply to candidates, in spite of the use of the more restricted “public official” terminology, is readily apparent from that opinion’s text and citations to case law. And if it be conceded that the First Amendment was “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” [citation omitted], then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.
Monitor Patriot Co., 401 U.S. at 271-72.

While the standard enunciated by the Supreme Court in New York Times and related cases developed in libel actions, the standard also applies to statutes authorizing penalties for violation of election laws that limit campaign speech:

Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount.
Brown v. Hartlage, 456 U.S. 45, 61 (1982).

In Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), *summarily aff’d sub. nom.*, Schwartz v. Pastel, 423 U.S. 1041 (1976), Riccio, a political candidate who lost an election to Ferris, complained to the New York State Board of Elections that Ferris had misrepresented Riccio’s voting record in a handbill distributed prior to the election. The statute at issue, which was somewhat similar to Montana’s, provided:

No person, . . . during the course of any campaign for nomination or election to public office . . . shall . . . engage in or commit any of the following:

made with knowledge of a falsity or with reckless disregard for the truth.”

Misrepresentation of any candidate's position including, . . . misrepresentation as to political issues or his voting record . . .

Vanasco, 401 F. Supp. at 101. The court found the statute unconstitutional because it did not include the New York Times actual malice mental state requirement. The court also noted that proof by “clear and convincing” evidence is a constitutional requirement, and a standard of proof requiring only “substantial evidence” would be insufficient. Vanasco, 401 F. Supp. at 99.

It is important to note that the “clear and convincing” standard of proof is a “more exacting measure of persuasion” than the standard burden of proof by a preponderance of the evidence in typical civil actions. John W. Strong, et al., *McCormick on Evidence* § 340 at 575 (4th Ed. 1992). Moreover, the “actual malice” standard requires application of a subjective, rather than an objective test. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Supreme Court considered a case where a political candidate (St. Amant) made allegedly defamatory statements about his opponent. The Louisiana Supreme Court had applied an objective test of recklessness in finding that St. Amant violated the “reckless disregard of the truth” standard when making his statements. Rejecting this analysis, the United States Supreme Court held that proof of actual malice requires proof of “an awareness . . . of the probable falsity” of the statement. St. Amant, 390 U.S. at 732. As the Court explained, “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion *that the defendant in fact entertained serious doubts as to the truth of his publication.*” *Id.*, 390 U.S. at 731 (emphasis added). See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974).

Of course, the New York Times standard itself reflects the principle that not all speech made during the course of a political campaign is protected by the First Amendment. The Supreme Court made this clear in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), when it stated:

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .” Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Thus, while there is no question that speech uttered during political campaigns is entitled to substantial protection under the First Amendment, it is equally clear that candidates are not entitled to deliberately lie, or use “calculated falsehoods” in their campaigns.

Applying the principles discussed above, the facts established in this case do not support a finding that Vincent knowingly made a misrepresentation or false statement in any of his campaign materials. In addition, there is insufficient evidence that Vincent acted with reckless disregard, since there is no clear and convincing proof that he subjectively entertained serious doubts as to the truth of any of the representations made in his campaign materials. While Vincent arguably could have exercised more care in conducting the research for at least one of his campaign statements,² there is insufficient evidence to prove that he violated § 13-37-131, MCA.

Alleged Violations of Code of Fair Campaign Practices

The complaint alleges that Vincent violated Montana’s Code of Fair Campaign Practices. The Code of Fair Campaign Practices (the Code) is codified in §§ 13-35-301 and 13-35-302, MCA. A candidate may voluntarily subscribe to the Code.

² The statement in Reason 8 of campaign ad 4 regarding Koopman’s failure to pass any bills he had drafted and introduced out of the House during the 2005 Legislature was erroneous. See Facts 28 – 31.

The Commissioner's office has the responsibility to prepare a form that sets forth the Code and send a copy of the form to each candidate required to file reports and other information with the Commissioner's office. A candidate's failure or refusal to sign the form is not a violation of the election laws. § 13-35-302, MCA. Moreover, the Commissioner has no authority to take any action if a candidate is alleged to have violated the Code. Matter of Complaint Against Brian Close, et al., Summary of Facts and Statement of Findings (2005); Matter of the Complaint Against Terry Utter, Summary of Facts and Statement of Findings (1995).

Koopman's Campaign Materials

In his response to the complaint Vincent raised the question whether certain campaign materials produced by Koopman violated some of the same statutory provisions that Koopman alleges were violated by Vincent. See Fact 44. In addition, a Koopman campaign flyer attached to Koopman's complaint does not appear to be in full compliance with the provisions of § 13-35-225, MCA. See Fact 43.

However, I have determined it is not appropriate to make a finding in this case on the question whether Koopman's campaign materials were in violation. Neither Vincent nor anyone else has filed a formal complaint alleging that Koopman's campaign materials were not in compliance with the law. This office operates with limited resources and must necessarily focus its investigative and enforcement efforts on resolving formal sworn complaints. Since no complaint has been filed and a more thorough investigation has not been conducted, I decline to make a determination whether Koopman's materials are in compliance with the laws governing campaign materials.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that any of the campaign ads violated § 13-35-225(3)(a)(ii), MCA by failing to disclose contrasting votes. There is insufficient evidence to conclude that John Vincent violated § 13-37-131, MCA. The Commissioner has no enforcement authority for alleged violations of the Code of Fair Campaign Practices, §§ 13-35-301 and 13-35-302, MCA.

There is, however, sufficient evidence to conclude that the campaign ads created and distributed by John Vincent violated several other provisions of § 13-35-225, MCA.

Campaign ads 1, 2, 4, and 5 contained information regarding Roger Koopman's voting record and did not reference the particular votes upon which the information was based, in violation of § 13-35-225(3)(a)(i), MCA.

Campaign ads 1, 2, 4, and 5 did not include a signed statement of accuracy, in violation of §§ 13-35-225(3)(a)(iii) and 13-35-225(3)(b), MCA.

Campaign ads 1 and 2 did not state John Vincent's party affiliation or include the party symbol, in violation of § 13-35-225(2), MCA.

Dated this 25th day of July, 2008.

A handwritten signature in black ink, appearing to read "Dennis Unsworth", written over a horizontal line.

Dennis Unsworth
Commissioner